Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00654/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3rd April 2013	**On 6 June 2013**
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Before

UPPER TRIBUNAL JUDGE KING TD

Between

MR LINA DIA BAVI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Duncan, Solicitor of Duncan, Moghul Solicitors & Advocates
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of the Democratic Republic of Congo born on 26th November 1975.

2. The appellant entered the United Kingdom illegally on 27th April 2003. He claimed asylum, that claim was refused and a subsequent appeal dismissed on the basis that the appellant was an untruthful and unreliable witness. His appeal rights became exhausted on 23rd February 2004.

3. He did not leave the United Kingdom. In June 2004 he made some form of application or approach to the Home Office using a different name and identity. It was accepted in his oral evidence before the Tribunal that he used a false passport in 2004. He said that he used it for a few months to obtain work until he was arrested and it was taken away from him.

4. In 2006 he met his current partner who is a national of Senegal. She came to the United Kingdom with her child Oumar on 6th December 2005. She was granted indefinite leave to remain on 16th November 2010.

5. Although the appellant and Miss Ndongo started their relationship in 2006 they did not commence living together until 2009. A daughter Therese was born on 13th March 2007. A daughter Miriam was born 2nd March 2008. Blessing was born on 6th June 2010 and Ahmad born on 16th July 2012.

6. In 2008 the appellant acquired a Belgian identification document which he used to obtain employment. He worked for a year. He was discovered in July 2009 and was arrested and subsequently charged with an office possessing a false document and making dishonest representations in connection with his employment.

7. On 17th February 2010 the appellant was sentenced to a total of twelve months' imprisonment.

8. A decision to deport the appellant under the provisions of Section 32(5) of the UK Borders Act 2007 was made on 15th September 2012.

9. The appellant sought to appeal against that decision which appeal came before First-tier Tribunal Judge Hemingway and Mr Getlevog, non-legal member on 1st November 2012. His appeal was dismissed in all respects.

10. The appellant sought to appeal against that decision contending that it was made in error of law on the basis that it had given undue weight to irrelevant considerations and had failed to make findings on key issues.

11. Leave to appeal was granted on that basis.

12. Thus the matter comes before me in pursuance of that leave.

13. Mr Duncan, who represents the appellant, invited my attention to a bundle of documents prepared for the purposes of the appeal including a skeleton argument.

14. In essence it is contended that the Tribunal focused unreasonably upon the appellant's failed asylum claim and had failed to take into account the appellant's current record. The appellant is living with his family and partner and has not reoffended despite having been released on bail on 9th September 2010 some 26 months before the hearing. It noted that the appellant received credit for pleading guilty at the earliest opportunity and there are references that he had been a worthwhile member of the community. It was contended therefore that it was unreasonable of the Tribunal to find that the appellant will offend again.

15. Further complaint is made as to the behaviour of the respondent in two respects. The first being that she made an arbitrary decision not to release the appellant upon the completion of his sentence thereby delaying the appellant's release by five months. Further that notwithstanding directions requiring the production of presentence reports and parole reports and other documents relating to the appellant's period of custody, these had not been presented.

16. In essence, therefore, it is submitted that balancing the impact which removal will have upon the five children against the fact that the appellant only appeared on one occasion being convicted on a guilty plea, her decision to remove was disproportionate if not perverse.

17. It is submitted that the approach of the Upper Tribunal towards the appellant's failed asylum claim and his use of false documents was, in the circumstances, unreasonable and distorted the proper balance.

18. Reliance was placed upon the decision of the Tribunal in **MF**, which was a case of similar nature and way the appeal was allowed. It is submitted that the Tribunal ought in all the circumstances to have followed **MF** rather than taken the draconian step of upholding the Secretary of State's decision to deport.

19. Mr Jarvis, on behalf of the respondent invited my attention to a number of authorities which he submitted clearly supported the approach taken by the Tribunal. The starting point for any consideration being that the offence itself was by Statute deemed to be serious and that the Tribunal were indeed entitled to put that serious matter within the overall immigration context. The Statute clearly indicated where in the public scale of interest this offence should properly fall. He invited me to find that the Tribunal had properly considered all relevant matters and that essentially the argument that was before me was less a matter of error of law but rather an argument as to merit balance. He invited me to find that there was error of law in this case.

20. The determination is detailed and I so find a careful and a structured one.

21. In terms of the family context some time is spent in considering whether or not it would be reasonable to expect the appellant's partner and

children to return with him to the Congo. That matter is analysed at some considerable length. It is apparent that the Tribunal accepts that it would not be reasonable for the family to relocate. Indeed for the purposes of the balancing exercise it was accepted that they were either British or were likely to acquire British status because of the leave of the mother.

22. At paragraph 59 in particular the Tribunal look at the interests of the five children. It is the conclusion of the Tribunal that it was in their best interest to have their father in the United Kingdom, but if he were deported, they would nevertheless continue to benefit from their own status in the United Kingdom. It was accepted that contact was maintained between the appellant and his partner throughout his period of imprisonment and that he fulfils the normal role of father to all his children, including Oumar – his partner's first child. The only further information that would seem to be considered was in respect of Amin Blessing was born on 6th June 2010. She would seem to be receiving some medical treatment for burns which received and that will require some further plastic surgery. She is now 2 years old.

23. There was no other evidence as to any particular emotional need or attachment other than those that would be reasonable to be expected of children with their father. There were no social reports as to any emotional or eventual trauma that arose during the absence of the appellant in custody or relating to any proposed removal of the appellant from the family. No such features have been highlighted in the skeleton argument in any event. That matter was specifically noted by the Tribunal at paragraph 52 of the decision.

24. So far as the appellant's offending is concerned that was noted as was the context of the appellant's general immigration history. The appellant had accepted that he obtained a false passport in 2004 and had used it to obtain employment. Although he was not charged with that offence there seems to be no reason at all why that matter should not be borne in mind by the Tribunal. Essentially the appellant arrived illegally, had worked illegally and had used false documents in 2004 and more particularly in 2008 resulting in his conviction.

25. I find that it was open to the Tribunal also to bear in mind the issue of a false claim for asylum, though perhaps not the most significant feature. Nevertheless it is to be borne in mind that the appellant's overall behaviour demonstrated a disregard for immigration control or Regulations, precisely the sort of conduct which would merit some response from the immigration authorities to secure his removal.

26. In terms of the appellant's return to the Democratic Republic of Congo the Tribunal also noted the absence of family members or at least contact with them.

27. Looking at the factual matrix I can find nothing suggestive of any misunderstanding of a material fact or an exclusion of any relevant fact within this proper context for consideration.

28. Mr Duncan places consideration reliance upon the decision of the Tribunal in **MF (Article 8 – new Rules Nigeria) [2012] UKUT 00393 (IAC)**. This was a decision of the Tribunal to give a guidance as to the proper approach to be taken to deportation in the light of the new Immigration Rules (HC 194) introduced on 9th July 2012. Essentially the two stage approach is still to be followed namely a consideration of the Immigration Rules themselves. Secondly to consider Article 8. It is to be noted that although the Rules themselves import the concept of "exceptional circumstances" that is not the correct criterion for Article 8 which remains to be determined as has been judicially defined. The Tribunal stressed that the new Rules do not furnish a new complete code for dealing with Article 8 claims they do themselves leave considerable scope for individual assessment.

29. Significantly however for the current purposes the Tribunal in **MF** at paragraph 42 set out as follows:

> "42. There is, however, at least one important respect in which the new Rules affect the second stage Article 8 assessment. Previously Judges' understanding of the weight the Secretary of State attaches to the public interest side of the Article 8 balancing exercise had largely to be gleaned from the submissions of the Secretary of State in leading cases. It has fallen very much to the judicial system to give it form and content. In deportation cases involving foreign criminals Section 32 of the 2007 Act gave clear Parliamentary expression to the particular importance the Secretary of State attached to their deportation … now more generally, greater specificity is given in the new Rules as to what circumstances are seen to attract the greatest weight in respect of the public interest; the Secretary of State has now herself told us what factors she considers relevant and what weight at the general level she attaches to them. In particular, in the context of deportation of foreign criminals, the new Rules set out thresholds of criminality (by reference to length of terms of imprisonment) so that the Article 8 private life claims brought by foreign criminals can only succeed (unless there are exceptional circumstances) if they not only have certain periods of residence but can also show their criminality has fallen below these thresholds.
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> 43. "That must and should properly inform our Article 8 assessment made in compliance with our Section 6 obligations under the HRA. Whereas previously it has been open to Judges, within certain limits, to reach their own view of what the public interest

is and the weight to be attached to it, the scope for doing so is now more limited."

30. The Tribunal went on at paragraph 48 to say as follows:

> "Thus in our view provisions of the new Rules dealing with Article 8 claims have two functions:
>
> (a) they create new provisions which must be given legal effect all that is left is a matter for the Tribunal of the courts whether their application is contrary to a person's Article 8 rights; and
>
> (b) they operate to enhance judicial understanding of the "public interest" side of the scales."

31. The Tribunal in the case before me has adopted the two stage approach. It considered paragraphs 398 and 399 as to whether there were any exceptional circumstances which would arise such that the appellant and or the children would benefit from those Rules. The Tribunal concluded that those Rules did not assist the appellant.

32. The Tribunal went on to consider Article 8 and bore in mind what was said in **MF** concerning the importance to be attached to the public interest in the light of those Rules indeed in the light of the statutory framework in any event. That is seen at paragraph 65 of the determination.

33. It has long been held that deportation of a foreign criminal reflects three facets of the public interest. The Court of Appeal in **RU (Bangladesh) [2011] EWCA Civ 603** at paragraph 33 highlighted those matters by reference to **OH (Serbia)**. The facets as identified are:

> "(a) the risk of reoffending by the person concerned;
>
> (b) the need to deter foreign nationals from committing serious crimes by leading them to understand that whatever the other circumstances one consequence of them may be deportation;
>
> (c) the role of deportation as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes."

34. The Court of Appeal went on at paragraph 34 to recognise that the effect of Sections 32(1)-(3) of the UKBA must be that if a person meets the conditions which bring him within the definition "foreign criminal", then his deportation is deemed by Statute to be conducive to the public good. As Parliament has stated that it is conducive to the public good to deport "foreign criminals". It is therefore not open to the person to argue that his deportation is not conducive to the public good, nor is it necessary for the Secretary of State for the Home Department to prove that it is.

35. In the absence of the appellant coming within the Immigration Rules themselves the proper route is clearly one of Article 8 to show that removal would infringe the potential deportation for deportees' ECHR rights and that it would be disproportionate in all the circumstances for that removal to take effect.

36. In **Maslov v Austria [2009] INLR 47** the Grand Chamber highlighted the importance to be attached to the specific circumstances in each case in matters particularly affecting young adults relevant considerations include;-

- the nature and seriousness of the offence committed by the appellant;

- the length of the appellant's stay in the country from which he or she is to be expelled;

- the time elapsed since the offence was committed and the appellant's conduct during that period;

- the solidity of social, cultural and family ties with the host country with the country of destination.

37. Generally speaking those have been considered by the Tribunal.

38. The issue has been taken with the conclusion of the Tribunal that in the light of the appellant's immigration history the risk of reoffending cannot be excluded. It is contended that little regard has been had to his lack of offending since his release. It is to be recognised in that connection that upon his release the appellant would have been subject to licence restrictions for a period in any event.

39. However risk is only but one of the three facets that fall to be considered. Due consideration must be given to where the Secretary of State considers that the public interest should lie.

40. The Tribunal in paragraph 66 came to the conclusions that the appellant had embarked upon a protracted period of deception encompassing a false asylum claim, a false asylum appeal, remaining in the UK unlawfully for a number of years and the use more than once of false documents to obtain illegitimate employment. That was a substantial package of troubling behaviour. As I have indicated it is not necessary for the Tribunal to embark upon whether that behaviour came and met the threshold because under Statute it has been deemed that it did.

42. In essence the heart of the appeal lies the contention that in balancing the interests of five children and a partner on the one hand and a one year

sentence for false documents on the other it is perverse of the Tribunal to have come to the conclusion which it did that removal was proportionate.

43. In that connection reliance is placed upon the similarity of facts in **MF** and the fact that in that case the Tribunal allowed the appeal. In that case the appellant arrived in the United Kingdom in 1998 as an illegal entrant. In 2009 he was convicted of handling stolen goods and possessing a false instrument for which he was sentenced to eighteen months' imprisonment. Effectively however he committed all those offences between late October and late November in 2005. He had obtained a certificate of approval to marry and had a daughter born a British citizen.

44. It was a relevant consideration in that case that the appellant had committed the offence many years before. It was also considered by the Tribunal in paragraph 80, that the Secretary of State had not actively pursued the appellant's deportation earlier, which she could have done if his asylum claim had been timeously processed. There is a danger in seeking to make comparisons to fact specific cases. The Tribunal in **MF** were remaking the decision for themselves whereas in this case it is a question as to whether or not the Tribunal erred in law in the approach which it took. Thus different considerations clearly should apply.

45. In that connection care must be taken that I do not seek to substitute what I might consider to be the merits for those of the Tribunal unless and until there is determined an error of law.

46. A period of twelve months' imprisonment or dishonestly for having and using false documentation is a serious offence. The Rules indicate the way in which the Secretary of State considers that public interest to be reflected. It would not be open to the Tribunal to disregard those matters without good reason.

47. As the Court of Appeal indicated in **JO (Uganda) [2010] EWCA Civ 10** at paragraph 22, there is only limited value in drawing comparisons with the outcome in other cases. All such cases are highly fact sensitive. As I have indicated the Tribunal are perfectly entitled not only to consider the offence itself, but the context in which the appellant has lived in the United Kingdom.

48. As was made clear in paragraph 30 of **JO** where a person to be removed is the person unlawfully present in this country was also committing a criminal offences, a decision to remove him may pursue a double aim, namely the prevention of disorder or crime as well the maintenance of effective immigration control. As the court went on to say as follows:

> "But if reliance is placed only on effective immigration control, it is difficult to see how a person's criminal offending would relate to that aim or, therefore, count as a factor positively favouring removal. On the other hand, it might still have a significant effect on the

proportionality balance by reducing the weight to be placed on the person's family or private life."

49. In this case there is not only the criminal offence itself which is deemed to be serious but also the pattern of a more widespread disregard of Immigration Rules and controls. It is readily apparent therefore that not only is his deportation deemed appropriate for the criminal offence itself but there are wider considerations which have been borne in mind by the Tribunal in the conclusion and in the decision on proportionality which they have embarked upon.

50. It is clear that a detailed and thorough proportionality consideration has been made, the Tribunal coming to the conclusion that it would not be disproportionate in the light of the appellant's offending and immigration history for him to be deported notwithstanding the effect that that might have upon his family. It seems to me and I so find that that is an approach properly undertaken by the Tribunal. Although it is perhaps a hard decision bearing in mind the five children that will be deprived of their father nevertheless it is difficult to describe such decision as perverse or **Wednesbury** unreasonable in all the circumstances, particularly bearing in mind the statutory considerations that have to be applied and those set out in **MK**.

51. I do not find any material error of law in the decision. Accordingly the appeal is dismissed.

Signed Date

Upper Tribunal Judge King TD